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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

ALLEN L. FAILS, *et al.*,
Petitioners,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondents in this case. Petition-

ers have refused to consent to the filing of that *amicus curiae* brief.

Interest of the Amicus Curiae and The Issues Covered In The Attached Brief

The AFL-CIO is a federation of 96 national and international unions having a total membership of 13,500,000 working men and women. Its interest in the instant case is evident: many AFL-CIO unions covered by the Railway Labor Act have negotiated union security clauses in collective agreements; these clauses provide stability in labor relations by assuring that all employees in the repsented units contribute toward paying the costs of the union's activities. The AFL-CIO has long supported legislation permitting union security provisions, and has participated as *amicus curiae* in this Court's cases concerning the validity and application of such provisions.

The attached *amicus curiae* brief is addressed to the theoretical underpinnings of the constitutional standard announced in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). We demonstrate that the *Abood* standard permitting expenditure of agency shop fees for any expense "germane to" collective bargaining, and permitting objecting employees to opt out of paying only for political activity and ideological activity unrelated to collective bargaining, is no First Amendment anomaly. Rather, the *Abood* standard reflects both the weak, attenuated, and indirect nature of the First Amendment interests relied upon by petitioners and the strong state interest in a viable system for maintaining industrial peace. By providing for limited individual exclusions only where the state interest is weakest or the First Amendment protections elevated, *Abood* both preserves the legislature's authority to advance industrial peace through union security provisions and provide dissenters with protection in those circumstances in which their constitutional claim is more than ephemeral.

CONCLUSION

For the reasons stated above, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' entire argument on the central substantive issue in this case can be restated, with no loss of subtlety or nuance, in a single paragraph: Because *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) states that mandatory support of their exclusive bargaining representative has "an impact" on objecting employees' First Amendment interests, exactly the same constitutional standard of review must be applied to each union expenditure as would be applied to a statute decreeing that no employee may, on pain of imprisonment, voice his criticisms of his exclusive bargaining representative or of the concept of collective bargaining. From that premise petitioners draw the conclusion that the Constitution provides that objectors may only be required to pay their proportionate share of union expenses "necessary" or "essential" to collective bargaining. Pet. Br., at 13. Therefore, argue petitioners, the Railway Labor Act must be read to incorporate that severely limited standard, even though such a standard nowhere appears in the statutory language and is never even mentioned in the 33-page *Abood* opinion.

This argument suffers from the fatal defects that its conclusion is entirely inconsistent with what the Court *said* in *Abood* and in its three Railway Labor Act predecessors (*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963)), and with the underlying reasoning of those cases.[1]

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[1] Moreover, the refusal of the *Abood* majority to adopt petitioner's conclusion or the argument underlying that conclusion, was no mere oversight: The minority opinion in *Abood* put forward an identical proposition to the one petitioners' support, backed by a

Thus, petitioners ask the Court to reverse a recent, considered constitutional ruling. To support this extraordinary request, however, petitioners simply string together a series of quotations torn from their context of First Amendment cases concerning direct governmental inhibition of traditional, affirmative First Amendment rights. This brief is devoted to a demonstration that, contrary to petitioners' suggestion, the *Abood* holding is in no way a First Amendment anomaly. Rather, the *Abood* approach reflects an appropriate recognition that the right claimed here to refuse to pay money for expenditures of which one disapproves implicates First Amendment values only to a very limited degree. As such, *Abood*'s holding fits comfortably into this Court's First Amendment jurisprudence, as several cases decided after *Abood* particularly confirm.

I. The "right" upon which petitioners rely as "transcendent" (Pet. Br. 26) is in fact an extremely limited nonassociational interest. In many ways, indeed, petitioners are claiming a personal right of dissent which could be raised with regard to a broad range of legislation. Governmental subsidies of private speech are widespread in our society, and have never been thought to transgress the constitutional rights of those who disagree with a particular subsidized organization or its policies.

The reason the First Amendment does not strictly limit governmental activity in the manner petitioners' argument would suggest is that the Constitution is nowhere near as rigid as petitioners suppose. As this Court has recently made clear on several occasions the level of scrutiny accorded governmental action with First Amendment implications varies both with the strength of the First Amendment interest and the nature of the governmental interference. In this instance, the First Amend-

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similar constitutional thesis; unlike petitioners, however, the *Abood* minority explicitly recognized that the *Abood* majority had held otherwise. See 431 U.S., at 254-255 (opinion of Powell, J., concurring in the judgment).

ment right relied upon, for three reasons, justifies only limited judicial intervention: First, it concerns only monetary contributions, themselves an attenuated form of speech; second, it is an inverse right of nonspeech, a right this Court has made clear is *not* the mirror image of affirmative First Amendment rights entitled to the highest form of protection; and third, the government is involved in this statutory scheme in only the most indirect way, so that any fear of government-imposed orthodoxy is quite ephemeral.

II. *Abood* concluded that the governmental interest in preserving industrial peace by permitting union shop agreements was sufficient, except in two limiting circumstances, to justify any minimal attenuated impedence of petitioners' interest in "freedom of mind" which conceivably flows from such agreements. As *Abood* recognized, the very "free rider" rationale underlying union shop clauses demands that unions be permitted wide berth in spending agency-shop fees. For just as the tax system would be destroyed if widespread individual self-exclusion were allowed, so the union shop could not fulfill its purposes if individuals could opt out of paying for all but those expenses judicially determined to be essential for collective bargaining narrowly defined.

Abood did, however, permit objecting employees to refuse to pay for two categories of expenses. The first—ideological expenses unrelated to collective bargaining—is simply that class of expenses as to which the stated governmental interest has no pertinence whatever; that being so, even minimal interference with First Amendment interests is unjustified. The second category—contributions to political candidates—implicates an area—partisan elections—in which the Court has been especially sensitive to the need to preserve individual autonomy and to prevent governmental intervention. Consequently, *Abood*'s two narrow exceptions in no way justify the enormous intrusion sought by petitioners into the union security system Congress believed would best further industrial peace.

ARGUMENT

I. PETITIONERS' CLAIM RESTS ON A WEAK AND ATTENUATED CONSTITUTIONAL RIGHT AND IS ENTITLED ONLY TO LIMITED FIRST AMENDMENT PROTECTION

1. It is well to begin by highlighting once again (*see Abood*, 431 U.S. at 230) the precise nature of the right petitioners claim. First, in permitting union security provisions under the Railway Labor Act, Congress was careful to assure that employees' affirmative rights of speech and of association would not be affected. It was for this reason that proposed § 2 Eleventh of the RLA was amended before passage to provide that an employee may not be discharged if union "membership was denied or terminated for any reason other than" the failure to pay required dues. *Street*, 367 U.S., at 765.[2] Moreover, that RLA protection against union censorship of the speech and association rights of employees was augmented by the passage in 1959 of the Landrum-Griffin Act's free speech protections for union members. *See* 29 U.S.C. § 411(a)(2). Consequently, this case involves neither government suppression of speech (or of association) nor governmental approval of such suppression by a private group; instead, the government affirmatively *protects* the rights of employees covered by a union shop provision to speak out against union policies and to associate with others to do so.

Second, petitioners are not required to be full union members in any sense and need not participate in any way in any union activities. *See generally, Labor Board v. General Motors*, 373 U.S. 734, 742-743 (1963) ("'Membership' as a condition of employment is whittled down

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[2] As *Street* recounts (367 U.S., at 765), the original proposal led to objections that "the right of free speech is at stake. . . A man could feel that he was no longer able freely to express himself because he could be dismissed on account of criticism of the union." Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong., 2nd Sess., p. 115.

to its financial core."). There is no realistic ground for hypothesizing that responsibility for or agreement with the union's activities or policies would be ascribed to objecting employees such as petitioners. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). Thus, the *only* sense in which petitioners are being required to associate themselves with the union or its policies is by paying a relatively small amount of money to that organization each month.

Third, at least some of the union activities petitioners claim a right to refuse to finance are not protected even in an affirmative sense by the First Amendment. As *Abood* recognized, the First Amendment right of association concerns only association "for the purpose of advancing beliefs and ideas." 431 U.S., at 231. Indeed, no right of association is expressly stated in the First Amendment; rather, the free association right was judicially derived from the explicit constitutional protection because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449 (1958); *see also, e.g., Buckley v. Valeo*, 424 U.S. 1, 65 (1974); *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 121 (1981). Thus, the First Amendment does not guarantee the right to engage in purely social or purely economic affiliations with other individuals.[3] In large part (most obviously, with respect to

[3] *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (while "parents have a First Amendment right to send their children to educational associations that promote the brief that social segregation is desirable, and th[e] children have an equal right to attend such institutions . . . it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *See also* L. Tribe, *American Constitutional Law* (1978), at 702.

The consequences of any broader view of the First Amendment right of free association would be extremely disruptive of well-accepted governmental regulation. The First Amendment has never been thought to protect against close regulation of entities, such as

union expenditures for social activities and death benefits), petitioners are claiming a negative First Amendment right as to associational activities with no obvious connection to the communication of any ideas whatever. Thus, petitioners are claiming a right of nonassociation broader in scope than the affirmative right of free association, and one which seems to encompass the right not to pay for any *activities* with which one disagrees.

Finally, while they fail to acknowledge as much, petitioners are actually claiming the right not to be bound by decisions made, not by the government, but by their fellow employees, in accord with democratic procedures assuring petitioners themselves the option to be heard. The RLA does not mandate that employees be represented by a union; that decision is made by majority decision of the employees (§ 2, Ninth). Moreover, union officers are, of course, subject to periodic elections, in accordance with the stringent protection of Title IV of the Landrum-Griffin Act, 29 U.S.C. § 481 et seq. Finally, spending and policy decisions of the union are made in accordance with the union constitution. While petitioners do not have a voice in those union decisions, that is by their own choice. See § 2 Eleventh (a). Thus the RLA's scheme mirrors that of democratic society generally: Individuals are given an opportunity to participate in some manner (usually, in the general society, considerably more indirectly than in the present context) in the decision as

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unions and corporations engaged in their economic functions, even though the general right of workers to band together to *advocate* collective bargaining and improved working conditions is protected by the First Amendment (*Smith v. Arkansas Highway Empl.*, 441 U.S. 463 (1979); *Babbitt v. United Farm Workers*, 442 U.S. 289, 313 (1979)), and the political speech of corporations is accorded full First Amendment protection (*First National Bank v. Bellotti*, 433 U.S. 765 (1976); *compare Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-564 (1980) (limited First Amendment protection accorded commercial speech as it concerns lawful activity)).

to which policies should be pursued and which means used to pursue those policies, and they may decline that opportunity (for example, by not voting in elections); but the decision to decline to participate, whether because of ideological disbelief in the extant form of government or otherwise, does not ordinarily lead to any constitutional right not to be bound by the majority's decisions.

2. Indeed, as this examination of the relatively remote right petitioners rely on as "transcendent" (Pet. Br. 26) should suggest, the RLA's scheme is similar not only in one way but in many to the scheme governing the relationship between taxpayers and the government in our society. In both instances, there is no general suppression of speech or of association for speech purposes; indeed, there is enforceable protection of the right affirmatively to dissent and to associate to further dissent.[4] In both instances, there is ordinarily no obligation to support, or to appear to support, any entity or its policies, other than by exacted financial support. Thus, just as the union may not under the RLA require represented employees to profess an oath of loyalty to the union or to wear union buttons, so the government may not under the First Amendment compel the recitation of a pledge of allegiance (*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)), or the display of a license plate with a government-prescribed ideological message (*Wooley v. Maynard*, 430 U.S. 705 (1977)).

Further, the government subsidizes through tax dollars a wide range of activities affirmatively protected by the First Amendment when engaged in by individuals, as well as many that are not. Modern government

> is involved not only in many programs with no obvious communicative impact but, as well, in running museums, theatres, libraries, and schools, and in supporting through grants to private parties a myriad of pub-

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[4] In the case of the government, that protection is, of course, the First Amendment.

lications, reports, meetings, conferences, advertisements, and litigation.[5]

For example, the National Endowment for the Humanities (20 U.S.C. § 956 et seq), the National Science Foundation (42 U.S.C. § 1861 et seq.) and the National Endowment for the Arts (20 U.S.C. § 954 et seq.) all operate in large part by providing grants to private individuals and groups for scholarly or artistic work. Public television and radio stations, controlled by local non-profit organizations, receive substantial governmental subsidies through the Corporation for Public Broadcasting (47 U.S.C. § 396). The Legal Services Corporation provides funds for advocacy to private non-profit organizations (42 U.S.C. § 2996). Indeed, even commercial television involves, as a realistic matter, massive governmental subsidies in the form of free use of the limited spectrum of airwaves. Schiffrin, *supra*, 27 UCLA. Rev., at 624.

"In substance, compelled contributions [to unions] and government taxes [for subsidized speech] are much the same." Schiffrin, *supra*, 27 UCLA L. Rev., at 594. This is certainly not to say that unions may exact fees for anywhere near the broad range of purposes for which the government may do so; the appropriate scope of activities

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[5] *See generally* on the role of modern government in controversial activities generally, and in speech-related activities specifically, Schiffrin, *Government Speech*, 27 U.C.L.A.L.Rev. 565 (1980); *see especially id.*, at 593, 606:

> Compelled contributions to ideological causes with which some taxpayers violently disagree are the norm, not the exception. . . . It is simply too late in the day to propose that the Government Printing Office must close up shop, that subsidies for broadcasting and the arts must be abandoned, [or] that [for] legislatures and Commissions [to] produce public reports [is] unconstitutional.

See also M. Yudof, *When Government Speaks* (1983), especially 7 ("A recent study found that the federal government spends at least $500 million a year on hundreds of films, slide shows, TV programs, and radio broadcast.").

of unions and of government obviously differ enormously, and societal assessment of the strength of the interest in requiring financial support in the two circumstances will surely differ as well. For present purposes, however, the relevant issue is whether there is at stake in this case, as petitioners claim, a *First Amendment right* of nonassociation through financial support of the same stature as traditional affirmative free speech rights. For that purpose, we can see no reason to differentiate the First Amendment interests at stake in assessing the constitutionality of government action in the form of a statute overriding state law to permit required financial support of a private entity and government action in the form of a disbursement of tax dollars to a private entity.

The similarity between the interest claimed here to be entitled to First Amendment protection and that of ordinary citizens who disapprove of governmental expenditures suggests that the right relied on is not as "transcendent" as petitioners claim. "Government might well come to a halt if each taxpayer could decide not to pay taxes for programs or communications activities to which he or she personally objected." M. Yudof, *supra*, *When Government Speaks*, at 206. Thus, in insisting upon their wooden First Amendment analysis, petitioners are asking this Court to "sacrifice good sense to a syllogism." O. Holmes, *The Common Law* (1881), at 36.

3. The First Amendment requires no such sacrifice. In recent years, this Court has recognized that intrusions upon expressive activity formerly thought to be outside the First Amendment's proscription do to some degree implicate the policies underlying the system of free expression. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968) (public employees are in some circumstances protected from discharge on the basis of their criticism of the government or of government officials); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975) (purely commercial speech implicates First Amendment values); *Buckley v.*

Valeo, supra (First Amendment protects the right to spend money on political campaigns); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (First Amendment protects communicative activity by students in secondary schools). At the same time, the Court has been careful to insist that as the First Amendment interest relied upon becomes more attenuated or the form of government infringement less severe, the strict judicial scrutiny approach developed in the context of direct government suppression of traditional communicative activity is not necessarily applicable.

For example, in *Connick v. Myers*, —— U.S. ——, 51 U.S.L.W. 4436 (April 20, 1983), the Court addressed the application of the *Pickering* doctrine to a situation in which the employee's speech centered upon employment-related grievances not of general public concern. The Court was careful "not [to] suggest that [the employee's] speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment," noting that the First Amendment guards from actual censorship both "great secular causes [and] smaller ones." *Id.* at 4438. But the Court held, nonetheless, (1) that insofar "as [the employee's] communication cannot be fairly characterized as constituting speech on a matter of public concern, *it is unnecessary for us to scrutinize the reasons for her discharge* . . . [even] if the reasons for the dismissal are alleged to be mistaken *or unreasonable*" (*id.*, at 4438 (emphasis supplied)); and (2) that as to employee speech which *does* touch on matters of public concern, there is no necessity that the government assume any "burden to 'clearly demonstrate' that the speech involved 'substantially interferred' with official responsibilities"; rather "the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. . ." (*id.*, at 4439). Thus, the Court in effect adopted a "sliding scale" approach in that particular context, varying the degree of judicial scru-

tiny with the strength of the First Amendment interest involved.[6]

Similarly, this Court has recognized that where the governmental action complained of affects First Amendment activity in a partial, indirect, or attenuated manner, there is no occassion to apply the strict scrutiny standard in reviewing the validity of the governmental program. For example, in *Regan v. Taxation with Representation* ("*TWR*"), —— U.S. ——, 51 U.S.L.W. 4583 (May 23, 1983), the question was whether Congress could deny a tax deduction for lobbying activity by certain nonprofit groups while providing such a deduction for lobbying by other such groups. The Court recognized that nonprofit organizations indeed have a constitutional right to engage in lobbying, and recognized as well that "tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Id.*, at 4584. The Court rejected, however, the contention that " 'strict scrutiny' is required because the statute '*affect*[*s*] First Amendment rights on a discriminatory basis.' " *Id.*, at 4585. Noting that the government did not in any way *prevent* TWR from lobbying and that " 'constitutional concerns are greatest when the State attempts to impose its will by force of law' " (*id.*, at 4586, *citing Maher v. Roe*, 432 U.S. 464, 476 (1977), the Court held that, except "[w]here government provision of sub-

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[6] Other instances in which the Court has determined that the nature of the First Amendment interest implicated demands a more relaxed level of judicial review include: *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. at 563-64; *Buckley v. Valeo*, *supra* (limitation of contributions to political campaigns) (see pp. 12-14, *infra*, regarding the implications of this *Buckley* holding for this case); *Board of Education v. Pico*, 457 U.S. 853, 869-70 (1982) (plurality opinion); *id.*, at 875, 877 (Blackmun, J., concurring) ("the unique environment of the school places substantial limits on the extent to which official decisions may be restrained by First Amendment values . . . [b]ut . . . also makes it particularly important that *some* limits be imposed"); *see also*, *id.*, at 904, 907, 915 (Rehnquist, J., dissenting).

sidies is 'aimed at the suppression of dangerous ideas'," or is "irrational" (*id.*, at 4586), the decision to select "particular entities or persons for entitlement to this sort of largesse 'is obviously a matter for policy and discretion not open to judicial review.'" *Id.*, at 4585, quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937).[7]

4. In this instance, there are at least three different reasons, each quite sufficient in itself, supporting the *Abood* holding that, at a minimum, agency fee funds may constitutionally be spent on any matters "germane to collective bargaining." 431 U.S., at 219.

(a) As petitioners recount, this Court held in *Buckley v. Valeo*, that "[s]peech does not lose its first amendment protection because money is spent to project it." (Pet. Br. 8.) But this Court had considerably more to say in *Buckley* concerning the relatively remote connection between money contributions to others for the purpose of speech and the interests protected by the First Amendment than petitioners admit.

What *Buckley* actually *held* was that contribution limitations can often be sustained although expenditure limitations are ordinarily invalid. 424 U.S., at 58. The reason is that:

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[7] Other circumstances in which the mode of governmental interference with First Amendment rights has been held too attenuated to require the most exacting judicial scrutiny include: *Young v. American Mini Theatres*, 427 U.S. 50, 70-71 (1976) (plurality opinion); *id.*, at 73 (Powell, J., concurring) (where the government has "silenced no message[,] . . . invoked no censorship [and there is no] significant curtailment of . . . the opportunity for a message to reach an audience," full First Amendment scrutiny is not called for); *Perry Education Associaiton v. Perry Local Educators' Association*, —— U.S. ——, 51 U.S.L.W. 4165, 4168, 4170 (Feb. 23, 1983) (in determining access to governmental property which is not a public forum "the decision to grant [access] privileges . . . need not be tested by . . . strict scrutiny"); *Buckley v. Valeo*, 424 U.S., at 669-670 (program providing public financing of some candidates need not survive strict scrutiny).

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or a political committee entails only a *marginal restriction upon the contributor's ability to engage in free communication.* A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the indifferentiated symbolic act of contributing . . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his . . . communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss issues. [424 U.S., at 20-21 (emphasis supplied).] [8]

In accord with this analysis, the Court refused to inquire into the *amount* of the contribution limitation. *Id.*, at 30.[9]

In this instance, as noted (pp. 4-5, *supra*), the *only* required connection between the union and a dissenting

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[8] The *Buckley* court recognized as well that there, as here, associational freedoms were also involved, but noted that contribution limitations "leave the contributor free to become a member of any . . . association and to assist personally in the associations efforts on behalf of candidates." *Id.*, at 22.

[9] In *California Medical Association ("CMA") v. Federal Election Commission*, 453 U.S. 182 (1981), a plurality of the Court characterized *Buckley* as holding that contributions are " 'speech by proxy' " and involve only "some limited element of protected speech." *Id.*, at 196 & n.16. On this basis the *CMA* plurality held that "Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme." *Id.*, at 199 n.20. (The dissenters in *CMA* did not express disagreement with this analysis; instead, they dissented solely on jurisdictional grounds.)

employee is a relatively small periodic fee. *Hansen*, *Street*, *Allen*, and *Abood* have already held that *some* such contribution to the exclusive bargaining representative is constitutionally justified; thus, "the undifferentiated symbolic act of contributing" (*Buckley*, 424 U.S., at 21) is *not* here at issue. And, as in *Buckley*, only "speech by someone other than the contributor" is involved in this case, and a union decision to spend exacted fees on one rather than another program has no effect on "the contributor's freedom to discuss issues." *Id.*[10]

(b) Indeed, the First Amendment interest involved here is *more* attenuated than that involved in *Buckley*, for that interest concerns not the affirmative opportunity to speak explicitly protected by the First Amendment but an implied, negative right not to do so.

This Court has not had the occasion to explore at any length the appropriate relationship between the constitutional protection accorded speech and association and the protection accorded a refusal to speak or associate. Rather, the Court has in a total of two cases (other than *Abood*) upheld such claims on the basis of the particular circumstances presented (*West Virginia Board of Education v. Barnette*, *supra*; *Wooley v. Maryland*, *supra*) while refusing to recognize such a claim in another instance (*Pruneyard Shopping Center v. Robins*, *supra*).[11]

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[10] We note that *Buckley* involved contributions to political candidates, while this case does not. As we explain in Part II, *infra*, protection of speech concerning political candidates has long been understood to be at the core of the First Amendment. For this reason, it is particularly significant that *Buckley nonetheless* held the First Amendment interests implicated by the contribution limitations there at stake to be "marginal." Outside the partisan political context the First Amendment protection of the right to make a monetary contribution in any amount would, we believe, be even more limited than in *Buckley*.

[11] It is important to distinguish the right of non-association or "non-speech" from the superficially similar situation in which *exercise of the affirmative right to associate leads to adverse action against the person exercising that right*. For example, in *Elrod v.*

In other circumstances, however, the Court has made clear that constitutional rights are not to be mechanically read as invariably implying their precise obverse:

> *The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.* For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F.2d 919, 924 (C.A.3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245; *Kersten v. United States*, 161 F.2d 337, 339 (C.A. 10th Cir. 1947), cert. denied, 331 U.S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. [*Singer v. United States*, 380 U.S., 24, 34-35 (1965) (emphasis added) (holding that the right to trial by jury does not establish the right to a judge trial).]

Similarly, when the Court "follow[ing] the approach of *Singer*," determined that the Sixth Amendment's right to

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Burns, 427 U.S. 347, 355-56 (1976), the plurality held that requiring adherence to one political party in order to retain one's job meant that

> [a]n individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. . . .

Thus, insofar as *Elrod* is premised on associational rights, that decision involves protection of affirmative rights and not the purely negative right to refrain from associating at all. See Gaebler, *First Amendment Protection Against Compelled Expression and Association*, 23 Boston Coll.L.Rev. 995, 996 n.4 (1982). See also *Branti v. Finkel*, 445 U.S. 507, 514-516 (1980) (*Elrod* also based on protecting right to one's own "private political beliefs").

counsel guarantee is to be read as providing the right to proceed *pro se*, the Court stressed that "[t]he inference of rights is not, of course, a mechanical exercise" and such an "implied right must arise independently from the design and history of the constitutional text." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975).

Thus, the right *not* to speak or *not* to associate is by no means to be determined simply by inverting the holding of *Buckley*, or by concluding that anything the union has a First Amendment right to do, objecting employees have a First Amendment right not to financially support.[12] Indeed, an examination of the few negative First Amendment rights cases demonstrates that the "design" of the First Amendment supports implication of inverse rights only in a narrow range of circumstances.

The two recognized purposes of the First Amendment are: (1) " 'to secure the widest possible dissemination of information from diverse and antagonistic sources' [so as] 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by people' " (*New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)); and (2) "[t]he individual's interest in self-expression" (*First National Bank v. Bellotti*, 435 U.S. at 777 n.12). Of these two values, the first, the "marketplace of ideas" value, is the source of the right of association, itself *implied* from the Constitution on the ground that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *N.A.A.C.P. v. Claiborne Hardware Co.*, —— U.S. ——, 50 U.S.L.W.

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[12] As noted (pp. 5-6, *supra*), petitioners are, in large part, claiming a First Amendment right not to contribute toward activity with *no* First Amendment coloration of its own. We can conceive of no reason for concluding that implied, inverse First Amendment rights are *broader* in scope than the affirmative protections from which they are derived. Consequently, petitioners have no more free speech right *not* to contribute toward, for example, death benefits than the union does to maintain a death benefit program, precisely no First Amendment right at all.

5122, 5128 (July 2, 1982) quoting *NAACP v. Alabama*, 357 U.S. at 460.

A supposed "right" to remain isolated from the expressive activity of others, or not to communicate at all, is for the most part divorced from the "marketplace of ideas" purpose of the First Amendment. An individual who refuses to express his or her views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing but contracting the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote.

It is, of course, true that an individual may object to the fact that through association, ideas opposed to his own may ultimately be magnified in volume and importance. But at least where, as here, the individual remains entirely free to add his own voice to the dialogue, and to associate with others to do so, the potential impact of an involuntary payment upon the interchange of ideas is negligible. Indeed, in *Regan, supra*, this Court necessarily rejected the notion that when the government grants a limited, solely financial advantage to one organization's speech activity that grant constitutes such a fundamental distortion of the balance of public dialogue as to violate the First Amendment. That is why *Regan* rejected the proposition that one group not similarly favored has a right to end a government subsidy to another group for lobbying purposes. Any other conclusion would make unconstitutional the entire spectrum of governmental speech activity and of governmental support for communications by private individuals. *See*, pp. 7-9, *supra*. For any other conclusion would read into the free speech clauses of the First Amendment an analogy to the neutrality requirement of the religion clauses and thereby bring all such government activity to a halt by, for example, requiring the government to print everything or print all first submitted materials if the government printed anything. This Court, presumably for this reason, has expressly held that analogy to be "patently inapplicable." *Buckley v. Valeo*, 424 U.S., at 92.

It is, therefore, not surprising that only the other branch of First Amendment values, concerning the preservation of individual integrity, has been at issue in the negative First Amendment right cases. In *Barnette* the Court was concerned to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control" (319 U.S., at 642); and in *Wooley* the Court characterized the interest at stake as "the broader concept of individual freedom of mind" (430 U.S., at 714). *See also Abood*, 431 U.S., at 234-35; *Elrod v. Burns*, 427 U.S., at 356-57.

Barnette and *Wooley* themselves make clear that it is not to be lightly inferred that governmental activity is aimed at imposing such official control. Both cases expressly recognize that the First Amendment injury alleged in those cases did *not* arise simply from the fact that the government was sponsoring communicative activity with taxpayers' money. Thus, in *Barnette*, the Court stated: "National unity as an end which officials may foster by persuasion is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." 319 U.S., at 631, 640. And, in *Wooley* as well, the Court recognized that where "[t]he State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism . . . the State may legitimately pursue such interests in any number of ways." 430 U.S., at 717. *See also Board of Education v. Pico*, 457 U.S., at 864 (plurality opinion); *id.*, at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.*, at 896-97 (Powell, J., dissenting); *id.*, at 909, 915 (Rehnquist, J., dissenting).

The injury redressed in *Barnette* and *Wooley* inhered, then, not in some automatic right of silence mirroring affirmative First Amendment protections but, instead, in two special factors common to those cases: First, in both instances citizens were required to make direct, intimate, affirmative professions of belief. In *Barnette*, for example, the question was whether children compelled to at-

tend school could be required to rise on their own two feet and utter prescribed thoughts out of their own mouths. In *Wooley*, the central question was whether an individual required to carry on a car's license plate a political message with which he or she disagreed was being asked to engage in a compelled affirmation of belief in the *Barnette* sense. The Court stated: "Here, as in *Barnette*, we are faced with a state measure *which forces an individual, as part of his daily life* * * * [to] becom[e] the *courier for* * * * *a message*." 430 U.S., at 715, 717 (emphasis added).

Second, in both *Barnette* and *Wooley* the *only* governmental purpose was the *didactic* one of inculcating a government-prescribed message. In *Barnette*, "[T]he Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity." 319 U.S., at 631 n.12. And in *Wooley*, the Court did not find credible the state's submission that a purpose of its rule was to "facilitate[] the identification of passenger vehicles" (430 U.S., at 716); instead, the Court found the *only* purpose to be "promot[ing] appreciation of history, individualism, and state pride," an interest which "is not ideologically neutral" (*id.*, at 716, 717).

Pruneyard Shopping Center v. Robins, *supra*, makes clear that the negative First Amendment interest protected in *Barnette* and *Wooley* is not simply the inverse image of established First Amendment rights, but depends instead on the two particular factors common to those cases. In *Pruneyard*, the argument was advanced that a shopping center owner has a First Amendment right to refuse to allow his property to be used to convey any message. The Court, however, found no consitutional infringement whatever, stressing: first, the impersonal character of the property at issue (*id.* at 87) ("[m]ost important, the shopping center . . . is not limited to the personal use of its owner"); and second, that

the government was not pursuing a solely didactic purpose (*id.*, at 86) ("no specific message is dictated by the State"). Yet, had *Pruneyard* involved the opposite situation—*viz*, had California been attempting to *prevent* the shopping center from allowing political speech on its premises—the First Amendment rights of the shopping center owner would surely have been infringed. *See First National Bank v. Bellotti, supra*; *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

The present circumstances are considerably closer to *Pruneyard* than to *Wooley* and *Barnette*: The only link between the objecting employees and the union are periodic payments of money; those employees are not required to utter or to carry on their person *or* their personal property any message whatever. And the government's general purpose in permitting the requirement of financial support is to further industrial peace, and not solely to inculcate in the populace a particular ideological belief. Consequently, union shop clauses, like government speech subsidies, do not, as an ordinary matter, significantly implicate the First Amendment interest in "individual freedom of mind," although (as *Abood* held, 431 U.S., at 234, and as the recent spate of literature on government speech subsidies recognizes[13]), there are limited circumstances in which the fear of compromising freedom of thought through compelled subsidies of speech may be realistic. See Part II, *infra*.

(c) The third and final reason for concluding that union expenditure pursuant to agency shop clauses does not involve significant governmental intrusion into First Amendment rights is that the government has very little to do with the matter. In cases such as the present one, the constitutional claim really amounts to the contention that the government may not permit mandatory union financial support as a condition of employment unless the

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[13] See Schiffrin, *supra*, 27 UCLA, at 609, et seq. 622-26; M. Yudof, *When Government Speaks, supra*, 164-173.

government simultaneously imposes strict limitations upon the uses the union makes of the exacted funds. In other words, it is government *inaction* in the form of a declination to regulate private action rather than government action that is at the center of the constitutional issue regarding expenditure of agency shop fees.[14]

State action cases decided since *Hanson, Street,* and *Allen* indicate that it is questionable whether inaction of this variety necessarily gives rise to constitutional considerations at all, even where a government-created monopoly or an entity supported almost entirely by government funds is alleged to be violating constitutional rights. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-58 (1974); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-843 (1982).[15] In light of *Hanson's* holding that the RLA's *preemption* of state law is government action that brings the First Amendment into play (351 U.S. at 232), we do not maintain that the indirect nature of governmental involvement in this case demonstrates that there are *no* constitutional constraints on the uses of the money exacted. Rather, the state action cases illustrate that the degree of governmental action, and therefore of constitutional infringement in this situation, is marginal at best, since the actual spending decisions are made by

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[14] *Hanson, supra,* determined that there is state action here with respect to the validity of the union security requirement generally and did not address the issue of state action with regard to the expenditures made by the union. We note that the observation in the text is in large part true as well with respect to the public sector agency shop clauses at issue in *Abood.* There is one level more government involvement in such cases, for an agency of government, as the employer, entered into and stands ready to enforce the agency shop requirement. The expenditures complained of, however, are strictly those of a private entity, the union.

[15] See also *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982):

> [C]onstitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. * * * Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.

a private entity, with no governmental involvement (or even any detailed governmental knowledge or approval) whatever.

It is instructive in this regard that this Court recently held that even where the Establishment Clause is invoked,[16] government action of this indirect, passive kind does not amount to establishment of religion. *Mueller v. Allen*, —— U.S. ——, 51 U.S.L.W. 5050 (June 29, 1983), reviewed a private school tax deduction scheme and concluded that "[t]he historic purpose of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, *ultimately controlled by the private choices of individual parents*, that eventually flows to parochial schools from the neutrally available tax benefit at issue." 51 U.S.L.W., at 5053 (emphasis supplied). Here as well the spending choices are in no sense dictated by the government. Yet, petitioners would ascribe to the government, and then decry as government compelled affirmation of belief or establishment of ideology subject to strict First Amendment scrutiny, these purely private choices. *Mueller* suggests to the contrary, that, at the very least, the lack of involvement of the government in the actual spending decisions significantly decreases the extent to which there is a real danger of government-imposed uniformity of thought or belief. For this reason as well, a relaxed standard of review is sufficient to isolate those few areas in which First Amendment values are truly implicated.

II. THE *ABOOD* STANDARD PROPERLY PROTECTS THE FIRST AMENDMENT INTERESTS AT STAKE IN THIS CASE

For the reasons just discussed, union use of agency-shop fees over an objection ordinarily does not constitute a significant danger to the system of free expression. Recognizing this, *Abood* concluded "that such interference

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[16] As we have noted (p. 17, *supra*) this Court has rejected the conclusion that the free speech provisions contain an implicit anti-establishment principle.

as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," and determined that unions may constitutionally expend enacted fees even over objection "'[a]s long as they act to promote the cause which justified bringing the group together.'" *Abood*, 431 U.S., at 222-23, *quoting Street*, 367 U.S., at 778 (Douglas, J., concurring). On the other hand, when a union spends money on the campaigns of political candidates, or on ideological expenses unrelated to bargaining, *Abood* held, the union goes beyond "the cause which justified the group together" (*id.*, at 234); in those circumstances, even the relatively minimal compromise of constitutionally-protected communicative interests that occurs cannot be sanctioned.

1. This focus on the "cause which justified bringing the group together" reflects an appropriate touchstone not only in union security situations, but in the broader range of circumstances in modern society in which government requires a group of individuals with some common role or affiliation (including a geographical one) to support financially activities centering on that common factor. As Justice Douglas recognized in his concurrence in *Street* (upon which the *Abood* majority relied, 431 U.S., at 223), often, "in an industrial society . . . an association with others is compelled by the facts of life." 367 U.S., at 775-776 (Douglas, J., concurring). Thus, lawyers in a state, students in a state university, and employees in an industry constitute a "latent" group—*viz.*, "a number of individuals with a common interest" (M. Olson, *The Logic of Collective Action* (1964), at 8)—whether or not the individuals are bound to a formal organization. And there are economic circumstances in which the members of the "latent" group will not support, unless required to do so, a formal entity, democratically controlled, devoted to forwarding the group's common interests. The reason is that the effects of certain expenditures (called "public goods" or "collective goods" or "social wants") cannot be limited exclusively to those

willing to pay; a group of individuals similarly situated in some manner will be affected whether or not they choose to contribute to the cost (and even if they believe the expenditure to be against their own needs, desires or beliefs):

> Because one cannot economically be excluded from the benefits of a public good once it has been provided, * * * [a]ny potential buyer would refuse to pay anything like what the commodity is worth to him. Indeed, he would be likely to express an unwillingness to pay anything at all for it. * * * However, if each buyer reasons this way (and presumably he will), the good will not be provided. Public goods will only be provided if collective action * * * is taken. . . [(R. Haveman, *The Economics of the Public Sector* (1970), 25-26, 42-43).] [17]

Labor unions exist primarily to take such "collective action", thereby providing economic benefits to similarly-situated groups of employees:

> A labor organization works primarily to get higher wages, better working conditions, legislation favorable to workers and the like; these things by their very nature ordinarily cannot be withheld from any

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[17] Examples of "public goods" include "a flood control project, the more general benefits of which accrue to an entire region; a sanitary campaign that raises the general level of health throughout an area; expenditures for the judiciary system what secure internal safety and enforce contractual obligations; on protection against foreign aggression. . . ." R. Musgrave, *The Theory of Public Finance* (1959), 9-10.

It is important to note that some individuals are likely to have strong views on the desirability of any "public good." For example, some Americans viewed the Vietnam War as a precautionary measure constituting "protection against foreign aggression;" others as an entirely unjustified war of aggression on the part of the United States. Those in the latter group were *not* free legally to refuse to pay some or all of their federal tax bill because of their disagreement with national policy, as the federal courts had many occasions to hold. *See, e.g., Graves v. Commissioner of Internal Revenue*, 579 F.2d 392 (6th Cir. 1978); *Lull v. Commissioner of Internal Revenue*, 602 F.2d 1166 (4th Cir. 1978).

particular worker in the group represented by the union. Unions are for "collective bargaining" not individual bargaining. It follows that most of the achievements of a union, even if they were more impressive than the staunchest unionist claims, could offer the rational worker no incentive to join; his individual efforts would not have a noticeable effect on the outcome, and whether he supported the union or not he would still get the benefits of its achievements. [M. Olson, *The Logic of Collective Action, supra*, at 76.] [18]

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[18] This observation, it should be noted, is not true only with regard to those union expenditures which are *necessary* to collective bargaining, or within the statutory duty of fair representation. While petitioners, for example, may disclaim any interest in the internal communications system or the external organizing efforts of BRAC, these activities inevitably influence the effectiveness of the union in its role as bargaining representative; nonmembers are not excluded under the RLA from the benefits attributed to a union's so-called "institutional" expenditures, and such *effects* are, in any event, merged into the final bargaining results so that they cannot be isolated in any reasonable way.

Moreover the economic "free rider" problem exists as well when the union acts to further the cause that brings the group together by means other than through the bargaining process—for example, in championing "legislation favorable to workers." *See* Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations On the Uses of Union Shop Funds*, 14 U.C. Davis L. Rev. 591, 603 (1981):

> When a union is unable to obtain a particular concession through bargaining, it often seeks the same concession through the political process. If, for example, a union representing state employees negotiated an improved pension plan with the employer, all represented employees would receive the benefit. Those who did not financially support the union's efforts would be "free riders." If, instead, the union obtained the same pension plan improvement directly from the legislature as a result of lobbying efforts, and represented employees who did not support the union's efforts would be "free riders" in that situation as well. In both examples, the non-paying employees would have received a benefit paid for by the other employees' union dues.

Since, in such circumstances, "everyone knows that his benefit will be independent of his particular contribution . . . compulsion is called for. . . ." R. Musgrave, *The Theory of Public Finance, supra*, at 10. However,

> In a democratic society, the decision to satisfy one or another social want cannot be imposed in dictatorial form: It must be derived, somehow, from the preferences of the individual member of the group . . . *A political process must be substituted for the market mechanism, and individuals must be made to adhere to the group decision.* [*Id.*, at 10-11 (emphasis supplied).]

Thus, the economic circumstances which give rise to governmental taxation, to integrated bars, to compelled student fees, and to the agency shop are basically the same.[19] And in each instance our society goes no further than to require financial support, while assuring that the individual is free to register his views and preferences in ways other than the inappropriate market mechanism of refusing to pay.

Consequently, there is a strong justification for governmental required financial support in such circumstances. And precisely because of the nature of the governmental interest, there is ample reason for refusing to permit individuals to exempt themselves from defraying the expenditures that rationally further the group's common

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[19] It is true that "[i]t may seem strange to draw an analogy between the union and the state." M. Olson, *The Logic of Collective Action, supra*, at 50. But in terms of the interests implicated, it is hard to pereceive why there is

> less infringement of a "right" through taxation for the support of a police force or a judicial system [than through union security provisions.] . . . Of course, law and order are requisites of all organized economic activity; the police force and the judicial system are therefore presumably more vital to a country than labor unions. But this only puts the argument on the proper grounds: do the results of the unions' activities justify the power that society has given them? *Id.* at pp. 88-91.

interest—in this circumstance, their interests as employees. For the very basis for required financial support is that entirely rational individuals will *not* pay, given the choice, whether or not they disbelieve in the particular group or its efforts; separating conscientious dissenters from those who simply wish to save money while reaping benefits is a formidable task with its own constitutional costs, as *Abood* recognized (431 U.S., at 241). *Cf. United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring).[20] Yet, unless the range of possible exclusions is kept very narrow, a failure to conduct an inquiry into the motives of dissenters is likely to undermine the legitimate attempt to require similarly-situated individuals to support common benefits.

2. On the other hand there are, as *Abood* recognized, two limiting circumstances in which even a minimal, indirect or attenuated effect on First Amendment interests is not justified. The first is where the union expenditure is both "ideological" and "unrelated to collective bargaining." As Justice Douglas noted,

> If . . . dues are used . . . to promote or oppose birth control, to repeal or increase the taxes on cosmetics, [or] to promote or oppose the admission of Red China into the United Nations . . . then the group compels an individual to support with his money causes beyond what gave rise to the need for group

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[20] *United States v. Lee* held that even where there is a direct conflict with the First Amendment's religious Free Exercise clause, the government may compel payments to the Social Security system. The reason was that "mandatory participation is indispensable to the fiscal vitality of the social security system," at least if the possibility of individuals opting out became "widespread." *Id.*, at 258. (We note that there is no reason to believe that the result in *Lee* would differ if the government required mandatory participation in a social security system administered by a private organization; indeed, a large part of the social security system—namely, Medicare—*is* administered by private organizations, a practice this Court has upheld. *Schweiker v. McClure*, 456 U.S. 188 (1982).)

> action. [*Street*, 367 U.S., at 777 (concurring opinion).][21]

At the point posited by Justice Douglas, the economic circumstances justifying required financial support from members of a particular "latent" group no longer obtain. The reason is that

> a represented employee who receives an alleged benefit wholly unrelated to employment conditions is no more a 'free rider' than any member of the general public who is similarly benefited. Elimination of 'free riders' in these circumstances would not further the government's interest in maintaining peaceful labor relations. [*Gaebler, supra*, 14 U.C. Davis L.Rev., at 607.]

Since there is no longer any other governmental interest to be served, the situation does come to resemble the compelled affirmation of belief cases in at least one respect: the *only* available governmental justification becomes the illegitimate one in compelling support of ideas in which one disbelieves.[22] Further, expenditures by unions on communications completely divorced from its representational concerns are likely to be both small enough and isolated enough from expenditures to further its representational purposes so as to be deductable without endangering the basic cost-sharing principle.

The second narrow category of expenditures *Abood* excepted from the union shop obligation is political candidate campaign expenses. A candidate, even one who has

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[21] The "cosmetics" example, in our view, presents a marginal situation with regard to employees in the cosmetics industry. Such a tax could have a close relationship to such employees' employment situation.

[22] We note once again that where the union acivity in question in no real sense involves ideological or political communication (as, for example, death benefits and social activities), even this factor does not obtain, and there is (as *Abood* recognized in limiting its protections to unrelated *ideological* expenses) no basis for First Amendment protection.

taken positions similar to the group's positions on issues that directly affect the group, cannot be bound to forward the interests of those who support him, and will surely be called upon while in office to act upon matters having nothing to do with that group's interests. Thus, campaign contributions entail by necessity a substantial *spill-over* effect onto issues as to which the group has no common interest whatever.

In addition, and perhaps more important, the First Amendment interest in autonomy in candidate contributions[23] involves different concerns than apply with respect to any other form of communication. "The constitutional [free speech] guarantee has its *fullest and most urgent* application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (emphasis supplied). The reason of course, is that the election process is the base for our entire democratic system:

> [N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process, nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. [A. Bickel, *The Least Dangerous Branch* 16 (1962).]

To give the government any authority to encourage the involuntary aggregation of political campaign support is to distort, in at least a symbolic way, the basic precept of free majority consent from which the remainder of democratic theory—including the principle of deference to legislative decisionmaking on such questions as the best way to achieve industrial peace—derives. This heightened sensitivity to any official governmental intervention in the balance of partisan political power is the

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[23] It is not clear whether *Abood* permits individual employees to decline to pay *any* expenses associated with political campaigns, including registration-get-out-the-vote drives, nor does this case present any question concerning the scope of the *Abood* political candidate exception.

reason, it appears, why "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S., at 870-71; *see also id.*, at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede . . . this . . . extreme example[]"). It is also the reason why the otherwise diverse recent commentary on government speech issues is unanimous in depicting direct, unambiguous candidate support as the one area definitely off limits for the government. Schiffrin, *supra*, 27 UCLA, at 613, 622 et seq.; M. Yudof, *When Government Speaks, supra*, at 170-173; T. Emerson, *The System of Freedom of Expression* (1970), at 699 ("[T]he government would not be empowered to engage in direct support of a particular candidate for office. It is not the function of government ~~*pression* (1970) at 699 ("[T]he government would not be~~ to get itself relected.' ").

It was in recognition of this special concern for the integrity of the electoral process, it appears, that *Street*, *Allen* and *Abood* recognize the constitutional interest in autonomy in candidate campaign participation as one necessitating special protection.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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